

Review of the commercial radio standards

Options paper

MARCH 2011

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Executive summary

The Australian Communications and Media Authority's (the ACMA's) key strategic goal is to make communications and media work in Australia's public interest.

The purpose of reviewing the commercial radio standards on advertising, commercial influence and compliance programs is to ensure that regulation of commercial radio in these areas deliver appropriate and contemporary community safeguards. The existing commercial radio standards may no longer be appropriate given changes in commercial radio generally since the standards were introduced in 2000.

Rather than simply amend the current standards to address real or perceived deficiencies, the ACMA has taken the opportunity to do a wide-ranging, evidence-based review from first principles. The benefit of such an approach is that it allows consideration of the assumptions behind the community attitudes that grounded the three standards, as well as the best regulatory mechanism to address issues identified.

Utilising feedback from the ACMA's issues paper, this options paper identifies the elements of each existing standard, assesses the scope of possible reform and proposes options for more effective, efficient and appropriate regulation. The reform options seek to better recognise the interests of citizens by promoting relevant community standards and by encouraging licensee responsiveness to the need for fair and accurate coverage of public interest material. The ACMA's aim is to balance these objects with the regulatory policy of the *Broadcasting Services Act 1992*, which requires regulation to be flexible, stable and predictable.

In this paper, the ACMA proposes a range of actions for the reform of each of the commercial radio standards. By operating as licence conditions on all commercial radio licensees, the current standards have delivered benefits industry-wide. Notwithstanding the benefits, the standards could be maintained, varied or revoked.

Variations could address identified deficiencies, or change the way the regulation operates - for example, for commercial influence regulation could shift from a disclosure model to an editorial independence model. Alternatively, the standards could be revoked in favour of regulation by industry codes. Depending on the drafting of the industry codes, such a co-regulatory approach may deliver benefits to industry and could also deal with deficiencies in the current regulations.

It is also open to the ACMA to completely revoke the standards without recourse to replacement industry codes. This action is only suggested in respect of the standard dealing with compliance programs, acknowledging that industry awareness of its regulatory obligations has improved significantly since the standard was introduced.

This options paper has been issued for public consultation and the ACMA is seeking your input on the relative costs and benefits of each reform option proposed. Consultation is intended to assist the ACMA to decide on a reform option for each standard.

Submissions

The Australian Communications and Media Authority (the ACMA) invites submissions from interested parties on this options paper.

Submissions should be made:

By email: crsreview@acma.gov.au

By mail: Project Manager—Review of the commercial radio standards

Broadcasting Standards Section

Australian Communications and Media Authority

PO Box Q500

Queen Victoria Building NSW 1230

The closing date for submissions is **Friday 13 May 2011**.

Enquiries

Media enquiries should be directed to Tom Burton on (02) 9334 7816 or by email to: media@acma.gov.au

Publication of submissions

In general, the ACMA publishes all submissions it receives. However, the ACMA will not publish submissions that it considers contain defamatory or irrelevant material.

The ACMA prefers to receive submissions that are not claimed to be confidential. However, the ACMA accepts that a submitter may sometimes wish to provide information in confidence. In these circumstances, submitters are asked to identify the material over which confidentiality is claimed and provide a written explanation for confidentiality claims.

The ACMA will not automatically accept all claims of confidentiality. The ACMA will consider each claim for confidentiality on a case-by-case basis. If the ACMA accepts a confidentiality claim, it will not publish the confidential information unless required to do so by law.

When can the ACMA be required by law to release information?

The ACMA may be required to release submissions by law under the *Freedom of Information Act 1982* or for other reasons including for the purpose of parliamentary processes or under court subpoena. The ACMA will seek to consult submitters of confidential information before that information is provided to another party, but the ACMA cannot guarantee that confidential information will not be released through these or other legal means.

Sharing of information

Under the *Australian Communications and Media Authority Act 2005*, the ACMA is able to disclose submissions to the minister, the department including authorised officials, Royal Commissions and certain Commonwealth authorities such as the Australian Competition and Consumer Commission and Australian Securities and Investments Commission.

If information is accepted by the ACMA as confidential, the ACMA will seek to consult with the submitter of the information where the ACMA intends to share that information.

Overview

Review of the commercial radio standards

The ACMA is undertaking a comprehensive review of the three program standards applying to commercial radio broadcasting services:

- > Broadcasting Services (Commercial Radio Advertising) Standard 2000
- > Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000
- > Broadcasting Services (Commercial Radio Compliance Program) Standard 2000.

In 2008, the ACMA announced that the review would consider the appropriateness, effectiveness and efficiency of current regulatory arrangements under the commercial radio standards. Specifically the review aims to consider:

- > Community attitudes, industry practice and the regulatory environment in relation to commercial arrangements that may affect the coverage of matters of public interest on commercial radio.
- > The extent to which the commercial radio standards have achieved their objects, and the experience and performance of the commercial radio sector in meeting current regulatory requirements.
- > The most effective regulatory response to the issues that emerge during the review, including alternative regulatory approaches.

The ACMA has conducted extensive research to inform the review and, in early 2010, consulted on its issues paper concerning the commercial radio standards.¹ The attitudinal research published to accompany the issues paper has been used to inform the ACMA's assessment of current community standards regarding commercial radio. Drawing on the research and submissions received, the ACMA is now proposing a number of regulatory reform options.

If the ACMA decides to proceed with regulatory change, further consultation will be undertaken before the implementation of any reform.

From issues to options

In the issues paper of February 2010, the ACMA proposed the following matters for consideration:

- > Whether there is a *need* for regulation and, if so, what model of regulation is most appropriate, effective and efficient (including the specific regulatory mechanism).
- > If there remains a need for regulation, the *scope* of any regulation (including the program format(s) to which any regulation should apply, the person(s) to whom any regulation should apply, and the specific regulatory definitions which should apply).
- > If there remains a need for regulation, how such regulation should be put into *operation* (including the form that any requirements should take and any operational or drafting issues).

The issues paper posed a large number of questions to assist submitters in considering these matters for each standard.

¹ The ACMA issues paper, research reports and submissions received are available on the ACMA website at: www.acma.gov.au/WEB/STANDARD/pc=PC_311945.

To assist the ACMA to determine the scope of reform, the questions to be addressed in this options paper are:

- > In respect of advertising on commercial radio:
 - > What program formats should regulation of advertising apply to?
 - > Does the definition of 'advertisement' need to be changed?
 - > Should advertising be distinguished at or by a certain time in a segment?
 - > Is the 'reasonable listener test' sufficient to establish whether advertising is distinguishable?
- > In respect of the fair and accurate coverage of matters of public interest on commercial radio:
 - > What program formats containing matters of public interest should regulation apply to?
 - > Is the definition of 'commercial agreement' adequate?
 - > Whose agreements should a commercial radio licensee be responsible for?
 - > What is the best way to support transparency?
 - > What form and timing requirements should apply if there is on-air disclosure?
 - > What register and notification arrangements are appropriate?
- > In respect of compliance programs:
 - > Is there an industry culture of compliance or non-compliance?
 - > Is a program standard on compliance programs necessary?

Structure of this options paper

This options paper comprises the following three chapters:

1. Advertising
2. Fair and accurate coverage of matters of public interest
3. Compliance programs.

In each of the chapters, the ACMA sets out the:

- > evidence supporting the need for, and scope of, future regulation
- > appropriateness of maintaining a program standard as the regulatory mechanism
- > elements of the existing standard
- > findings on the scope of any reform
- > proposed reform options.

The findings made by the ACMA in each chapter lead to the reform options proposed at the end of each chapter. In proposing the options, the ACMA is seeking regulatory arrangements that are stable and predictable, while also meeting the objects of the *Broadcasting Services Act 1992* (the Act) in a way that is consistent with the regulatory policy of the Act.

The objects are set out in section 3 of the Act. The two most relevant objects for this review are:

- > to encourage providers of commercial broadcasting services to be responsive to the need for a fair and accurate coverage of matters of public interest (ss. 3(1)(g) of the Act)
- > to encourage providers of broadcasting services to respect community standards in the provision of program material (ss. 3(1)(h) of the Act).

The regulatory policy at section 4(2)(a) of the Act provides that broadcasting services be regulated in a manner that, in the opinion of the ACMA:

enables public interest considerations to be addressed in a way that does not impose unnecessary financial and administrative burdens on providers of broadcasting services.

In developing regulation that meets the above objects and regulatory policy, the ACMA also endeavours to ensure that the regulation works in practice, is cost effective and is balanced— that is effective, efficient and appropriate. In this paper, those terms are understood in the following way:

- > **Effective** regulation works in practice to provide community safeguards and support industry compliance.
- > **Efficient** regulation is cost effective by maximising the benefits to citizens, taking account of the costs to industry (both financial and administrative).
- > **Appropriate** regulation balances the needs of citizens with the imposition of regulatory burden on licensees.

1. Advertising

1.1 Overview

This chapter sets out evidence supporting the need to regulate advertising on commercial radio and concludes that a program standard has provided community safeguards suitable for the regulation of advertising on commercial radio. Four elements of the current Broadcasting Services (Commercial Radio Advertising) Standard 2000 are identified and each is assessed to determine the scope of possible reform.² Finally, two possible reforms are proposed: to vary aspects of the current Advertising Standard or revoke the standard in favour of an industry code.

1.2 Evidence of need and scope

Many radio listeners (60 per cent) accept the realities involved in operating commercial radio services, agreeing that 'advertising on commercial radio doesn't bother me because it's a business that relies on advertising to operate'.³ Many listeners also agree that integrating advertising with other program content on commercial radio is acceptable.⁴

However, the majority of listeners—80 per cent of all regular radio listeners and 79 per cent of regular commercial radio listeners—also consider that advertising content on radio should be clearly distinguishable from other radio content.⁵ In this context, there is evidence that, in some circumstances, live reads cannot be readily distinguished by radio listeners—even by those who are frequent listeners.⁶

All submissions to the ACMA's issues paper supported the need for some form of regulation to achieve transparency of advertising material. The commercial radio industry supported a move away from a program standard to regulation through an industry code. The submissions and research, taken together, do not support removing altogether the regulation of advertising on commercial radio.

Possible economic impact on licensees

The economic impacts of strengthening, relaxing or revoking the Advertising Standard are difficult to estimate. Generally, more prescriptive regulation is more likely to have an adverse economic impact on licensees than less prescriptive regulation. If further restrictions are put in place, advertising revenue earned by commercial radio licensees could fall. If other forms of, or platforms for, advertising are regarded as reasonable substitutes for advertising on commercial radio, this could be expected to result in a transfer from commercial radio to substitute advertising platforms.⁷

What is known from the economic analysis conducted by the ACMA is that though the costs of future regulation are difficult to estimate, an increased regulatory burden on

² Referred to in the remainder of this chapter as 'the Advertising Standard'.

³ See *Listener Attitudes to Advertising, Sponsorship and Influence on Commercial Radio 2010* at page 3.

⁴ Sixty-seven per cent of commercial AM talkback listeners agree that 'integrating advertising with other program content on commercial radio is acceptable so long as advertisers are identified at least once during the program'. Further, 55 per cent of commercial radio listeners agree that integrating advertising with other program content on commercial radio is acceptable so long as advertisers are identified at least once during the program. See *Listener Attitudes to Advertising, Sponsorship and Influence on Commercial Radio 2010* at page 3.

⁵ *Community Attitudes to Radio Content 2010* at page 4.

⁶ *Listener Attitudes to Advertising, Sponsorship and Influence on Commercial Radio 2010* at page 32.

⁷ *Review of the Expected Economic Costs 2011* at page 2.

industry could result in revenue moving away from commercial radio advertising to other kinds of advertising.⁸

1.3 Is there a benefit in maintaining a program standard?

Given the strong listener support for ensuring advertising is distinguishable the ACMA is satisfied that there remains a need for regulation in this area. As part of this review, the ACMA is reconsidering whether a program standard remains the most appropriate way to regulate to meet the needs of citizens regarding advertising on commercial radio. Alternatively, the re-introduction of an industry code may be suitable.

Under section 125 of the Act, the ACMA must determine a program standard where it is satisfied that one of the following is the case:

- > there is convincing evidence that a code of practice registered is not operating to provide appropriate community safeguards for a matter referred to in subsection 123(2) of the Act
- > no code of practice has been registered for a matter referred to in subsection 123(2) of the Act.

In deciding whether standards or codes are the most appropriate regulatory mechanism in accordance with section 125 of the Act, the ACMA is also informed by its assessment framework for optimal conditions for effective self- and co-regulatory arrangements.⁹ The optimal conditions can be grouped into two main categories:

1. **Environmental conditions** primarily relating to market and industry circumstances and whether these indicate that industry participants have the incentives and ability to work together effectively to address the issue.
2. **Features of the regulatory scheme** relating to its operation and enforcement.

To revoke the Advertising Standard in favour of regulation by an industry developed code of practice, the ACMA would need to have confidence that an industry code could operate to provide appropriate community safeguards. The Advertising Standard would continue to operate until any such code were developed.

Before the introduction of the Advertising Standard, advertising on commercial radio was regulated by co-regulatory industry codes. The *Commercial Radio Inquiry 2000* noted numerous serious breaches of the codes, concluding that code-based regulation was not operating to provide appropriate community safeguards. The Advertising Standard was introduced on the evidence that licensees were promoting commercial products and services in a manner that listeners could not discern as advertising. The program standard sought to better encourage commercial radio licensees to respect community standards by ensuring advertising was clearly distinguishable from all other programs.

Since 2000, there have only been a small number of investigations and associated breaches of the Advertising Standard. Industry asserts that continued regulation is not necessary given the high compliance levels shown.¹⁰ Nevertheless, the ACMA does not consider that the small number of breach findings is sufficient evidence of the

⁸ *Review of the Expected Economic Costs 2011* at page 16.

⁹ As contained in the ACMA's Occasional Paper *Optimal Conditions for Effective Self- and Co-regulatory Arrangements*, 2010. Available at: www.acma.gov.au/WEB/STANDARD/pc=PC_312187

¹⁰ Commercial Radio Australia submission to the ACMA issues paper at page 19.

existence of appropriate community safeguards.¹¹ In this regard, the ACMA's research findings are particularly pertinent.

The ACMA's research indicates that citizens have enduring expectations about advertising on commercial radio. In addition, certain advertising types that are prevalent on commercial radio make some content difficult for listeners to distinguish as advertising. This suggests a difference still exists between industry and community understanding of what advertising practices makes content discernible as advertising and therefore acceptable on commercial radio.

This disparity in understanding the community standards around advertising on commercial radio indicates that a program standard may remain an appropriate way to regulate industry.

However, the ACMA welcomes further submissions on this matter including whether: the optimal conditions do exist for regulation of advertising by code provisions, or there remains an expectation that advertising be regulated through a program standard.

Finding 1.3.1—The Advertising Standard has provided community safeguards suitable for the regulation of advertising on commercial radio.

1.4 The current standard

The object of the Advertising Standard is to 'encourage commercial radio broadcasting licensees to respect community standards by ensuring advertising is clearly distinguishable from all other programs'. The Advertising Standard has the following elements:

1. It applies to all program formats on commercial radio.
2. It requires advertising to be distinguishable and has an explicit definition of 'advertising' and 'consideration'.
3. It does not explicitly state that an advertisement must be distinguishable at the time the content is broadcast.
4. It uses a 'reasonable listener test' to assess whether advertising is distinguishable from other program material.

1.5 Scope of any reform

In considering the scope of any reform, the focus is on the following questions:

- > What program formats should regulation of advertising apply to?
- > Does the definition of 'advertisement' need to be changed?
- > Should advertising be distinguished at or by a certain time in a segment?
- > Is the 'reasonable listener test' sufficient to establish whether advertising is distinguishable?

1.5.1 What program formats should regulation of advertising apply to?

The current Advertising Standard applies to all commercial radio content. As such, it applies to a diverse range of programming including: news, current affairs (including talkback), music and sports programs.

¹¹ See the two ACMA investigations into licensee of 4EL, Prime Radio (Cairns-AM) Pty Ltd (Investigation Reports No 2302 and 2180) which found a total of three incidents that breached the Advertising Standard in 2008 and 2009, available at: www.acma.gov.au/WEB/STANDARD/pc=PC_310231.

The ACMA has not noted any particular program format trends arising in its formal investigations about the application of the Advertising Standard.

Consumer and listener research indicates that program format alters the level of sensitivity audiences have to advertising. Two-thirds of surveyed regular commercial radio listeners believe that in current affairs programs it is extremely or very important to be able to make a clear distinction between advertising and other content.¹² Whereas in non-current affairs programs a lower (but still significant) 47 per cent believe it is just as important.¹³ It follows that while there is greater sensitivity in relation to current affairs programs, the importance of a clear distinction between advertising and other content remains high irrespective of program format.

Submissions from commercial radio networks also support regulation across all formats:

Advertising is common to all formats and there is no need to create a more complex system of different frameworks for different formats ... The general principles of distinguishing advertisements from other content apply equally across the various formats.¹⁴

The ACMA notes the community standard that advertising should be distinguishable in all programs, and notes industry views that future regulation should not be overly complex. It appears therefore that the application of advertising regulation to all program formats:

- ✓ meets the community standard identified that advertising should be distinguishable from other program content
- ✓ provides a stable and predictable regulation for both licensees and listeners
- ✓ does not impose an undue financial and administrative burden on licensees (noting the above submissions from industry that distinction across different formats would be unjustifiably complex).

It follows that the application of the current standard to all program formats and content is effective, efficient and appropriate in so far as it:

- ✓ works to provide community safeguards (without discrimination) across all program formats
- ✓ maximises the benefits to citizens, taking account of the costs to industry (which may be increased if more complexity is introduced)
- ✓ achieves a balance between the needs of citizens by regulating all content but not imposing unnecessary regulatory burdens on licensees.

Given the support from both industry and citizens, any proposed reform option should seek to continue the application of advertising regulation across all program formats.

Finding 1.5.1—The regulation of advertising material in all program formats is acceptable to both citizens and industry.

¹² *Community Attitudes to Radio Content 2010* at page 52.

¹³ *Community Attitudes to Radio Content 2010* at page 52.

¹⁴ Austereo Pty Ltd submission to the ACMA issues paper at page 12. This was also supported by the Fairfax Radio Network submission to the ACMA issues paper at page 20.

1.5.2 Does the definition of 'advertisement' need to be changed?

The current Advertising Standard requires 'advertising' to be distinguishable. The definition of advertising in the standard has two parts:

- (a) material broadcast a substantial purpose of which is to draw public attention to, or to promote, directly or indirectly, an organisation, a product, service, belief or course of action; and
- (b) consideration has been provided by or on behalf of an organisation or a supplier of the product or service to a licensee, or to a presenter, or an associate of a presenter for the broadcast of that material.¹⁵

Consideration, in turn, is defined as 'any valuable consideration other than the provision, at no charge, of a product or service solely for review.' The Advertising Standard covers all advertisements broadcast by a licensee where there is both the provision of consideration and the broadcast of the advertisement. The standard makes no distinction between arrangements made with presenters or those made with licensees, so long as the advertisement is broadcast by the licensee.¹⁶

Investigations conducted by the ACMA into the Advertising Standard indicate that the first part of the definition is relatively straightforward to assess, but determining whether consideration has been provided for the particular advertisement can be more difficult. For example, where:

- > a licensee receives payment for promotional material broadcast, but receives no separate or distinct payment for similar material broadcast at a later date¹⁷
- > a sponsor has an advertising agreement but a particular promotional interview broadcast is not specified in the agreement¹⁸
- > products of a sponsor are promoted while an advertising agreement is being negotiated but the agreement is not concluded.¹⁹

The above examples illustrate how the current regulation is difficult to administer, especially where a licensee or presenter gains an interest or benefit (which may not fall within the current definition of valuable consideration) or the link between the provision of valuable consideration and the broadcast of the material is indirect or otherwise difficult to establish.

Commercial radio broadcasters submit that conversations between presenters and listeners or interviewees often include mentions of companies, products or services and a classification of all references to station advertisers as advertisements (requiring

¹⁵ Section 5 of the Advertising Standard.

¹⁶ If there is an advertising agreement between a licensee and an advertiser, then the Advertising Standard applies to the broadcast of advertisements pursuant to the agreement. If there is an advertising or commercial agreement between a presenter of a current affairs program and a sponsor, then the Disclosure Standard *also* applies to regulate the presentation of material relating to that sponsor.

¹⁷ See for example the ACMA investigation into the *John MacKenzie Show* by licensee of 4EL, Prime Radio (Cairns-AM) Pty Ltd, available at: www.acma.gov.au/WEB/STANDARD/pc=PC_310231.

¹⁸ See the ACMA investigation into various licensees including the licensee of 3AW, Radio 3AW Melbourne Pty Ltd (Investigation Report No. 2422), available at: www.acma.gov.au/WEB/STANDARD/pc=PC_310232. See also, Media Watch, *Want Longer Lasting... Interview? Call Kyle and Jackie O*, 1 June 2009, available at www.abc.net.au/mediawatch/transcripts/s2586347.htm.

¹⁹ Media Watch, *Plastic Too Fantastic*, 6 October 2008, available at www.abc.net.au/mediawatch/transcripts/s2383465.htm and Media Watch, *Plastic Too Fantastic (Part two)*, 9 February 2009 available at www.abc.net.au/mediawatch/transcripts/s2486629.htm.

them to be distinguished from surrounding content) would stifle discussion and spontaneity in commercial radio.²⁰

The Communications Law Centre (CLC) submitted that regulation should apply where the material is broadcast in exchange for 'consideration, interest or benefit'.²¹

Research shows that in the United States of America (United States), sponsorship identification rules provide for a broad interpretation of consideration. This is useful in capturing advertising material where consideration might otherwise be more difficult to determine or establish in an investigation. Those rules provide that:

All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person: Provided, that "service or other valuable consideration" shall not include any service or property furnished without charge or at a nominal charge for use on, or in connection with, a broadcast ... unless it is so furnished in consideration for an identification in a broadcast of any person, product, service, trademark, or brand name beyond an identification which is reasonably related to the use of such service or property on the broadcast.²²

The ACMA did not conduct research into listener attitudes to the definition of 'advertisement' or 'consideration'; although (as indicated above) it is clear that listeners think that, in general, advertising should be distinguishable.

By relying only on the provision of valuable consideration, excluding indirect interests or benefits gained, the current definition of 'advertising' means the regulation:

- × fails to meet the community standard identified that all advertising should be distinguishable
- × fails to provide stable and predictable regulation for listeners.

It follows that the current regulation is ineffective to the extent that:

- × it does not work to promote adequate community safeguards in all instances of advertising.

A more comprehensive definition of 'advertisement', particularly the definition of 'consideration', would assist in promoting adequate community safeguards in a wider range of circumstances. For example, the definition of consideration could explicitly include both direct and indirect benefits or interests. For example, the definition could be:

Any money, service or other valuable consideration or benefit that is directly or indirectly paid, or promised to or charged or accepted in respect of the material broadcast.

Finding 1.5.2 — The definition of 'advertisement' would be improved by having a clearer and more comprehensive definition of 'consideration'.

²⁰ Austereo Pty Ltd submission to the ACMA issues paper at page 13, Commercial Radio Australia submission to the ACMA issues paper at page 21 and Fairfax Radio Network submission to the ACMA issues paper at page 21.

²¹ CLC submission to the ACMA issues paper at page 3.

²² *International Regulation of Advertising, Sponsorship and Commercial Disclosure for Commercial Radio Broadcasting 2010* at page 47.

1.5.3 Should advertising be distinguished at or by a certain time in a segment?

The current Advertising Standard requires advertising to be distinguishable but does not explicitly state when a licensee must ensure that the distinction is made—for example, when the content is broadcast or at any time during the related radio program or segment. The ACMA has taken the view that advertising must be distinguishable to the listener at the time the advertising material is broadcast.

No submissions were received in response to the ACMA's issues paper on this point. Without the regulation *explicitly* prescribing when advertising must be distinguishable to the listener, the ACMA has discretion in the application of the regulation, which may lead to unpredictability for both licensees and listeners.

Though research participants were not explicitly asked when radio advertising should be made distinguishable, related findings are noteworthy. For instance, listeners find it most difficult to distinguish content as advertising where there is a lack of the usual signals or 'cues', and particularly where it is read live to air by a presenter and the product, service, brand or contact details are mentioned *toward the end of the live read*. The common signals and cues used to distinguish advertising are discussed further at 1.5.4.

The research suggests that listeners find it much easier to discern that material is an advertisement where the advertising signals and cues are presented towards the beginning of the advertisement. This research informs the view that advertising content and common signals and cues need to be very closely connected in time. Therefore, at the very least, advertising should be made distinguishable at the time the content is broadcast, particularly in live reads and sponsored interviews.

The above material indicates that the ACMA's current application of the regulation requiring advertising to be distinguishable at the time the advertising material is broadcast:

- ✓ meets the community standard that advertising should be distinguishable at the same time that the material is broadcast
- × might fail to provide stable and predictable regulation for licensees or listeners, because the timing requirement is not explicitly provided in the current regulation.

It follows that by not being explicit in this requirement, the regulation is ineffective and inefficient in so far as:

- × it does not work to support industry compliance
- × it is not cost effective, failing to maximise the benefits to citizens (which could be achieved at the same cost to industry if the requirement was explicit).

An explicit statement in the regulation requiring advertising to be distinguishable at the time the advertising material is broadcast would better ensure that community standards in this area are met, and would provide more stable and predictable regulation for industry and the ACMA.

Finding 1.5.3—Listeners find advertising most readily distinguishable as advertising if it is distinguished at the time the advertising content is broadcast. An explicit requirement of this would provide more stable and predictable regulation.

1.5.4 Is the 'reasonable listener test' sufficient to establish whether advertising is distinguishable?

The current Advertising Standard requires that:

Advertisements broadcast by the licensee must be presented in such a manner that the reasonable listener is able to distinguish them from other program material.²³

The standard does not prescribe how advertising material should meet this test. Determining whether an advertisement is distinguishable to a 'reasonable listener' requires an objective, case-by-case consideration of factors including content, style, tone, scripting and placement of the advertisement.

Commercial Radio Australia (CRA) and commercial radio networks submitted in response to the ACMA issues paper that this reasonable listener test is too vague to be workable and its interpretation by the ACMA leads to inconsistent and unpredictable outcomes.²⁴

As an alternative, a subjective test would determine whether a *particular* listener of the particular program was able to distinguish the material as advertising. Such a test would be based on the personal convictions, sensitivities and attributes of a particular listener—matters that the ACMA would need to be informed of in order to conduct the investigation. This type of test is likely to lead to more inconsistent and unpredictable outcomes.

The ACMA has conducted research to identify which commercial radio advertising practices led to the most difficulty for radio listeners in distinguishing advertising. This research assists the ACMA to be consistent and predictable in its application of the reasonable listener test. In general, the research found that advertising material which is less structured, more interactive and multi-faceted (use of talkback, discussions or expert interviews) caused the most difficulty for listeners.²⁵ This type of advertising is generally called 'integrated advertising'.

The research results indicated that listeners found 'live reads' (advertising material read live to air by presenters) difficult to distinguish as advertising especially where:

- > a presenter moved from editorial commentary directly into a live read
- > the product, service, brand or contact details were mentioned only towards the end of a live read.²⁶

Further, investigations by the ACMA have found breaches of the Advertising Standard in circumstances where advertisements were integrated into live interviews.²⁷

The research and investigation outcomes indicate that there is a material gap between industry and community views on whether such integrated advertising is sufficiently distinguishable as advertising.²⁸

²³ Section 6 of the Advertising Standard.

²⁴ CRA submission to the ACMA issues paper at page 2 and Fairfax Radio Network submission to the ACMA issues paper at page 3.

²⁵ *Listener Attitudes to Advertising, Sponsorship and Influence on Commercial Radio 2010*

²⁶ See the findings regarding participant reactions to audio clips at pages 14-35 of *Listener Attitudes to Advertising, Sponsorship and Influence on Commercial Radio 2010*.

²⁷ See Investigation Report 2180 and Investigation Report 2302 both into the *John MacKenzie Show* broadcast by Prime Radio (Cairns-AM) Pty Ltd, available at: www.acma.gov.au/WEB/STANDARD/pc=PC_310231.

²⁸ *Listener Attitudes to Advertising, Sponsorship and Influence on Commercial Radio 2010*.

CRA submits that substantive changes should not be made to the existing regulation on the basis of the above research.²⁹ However, the ACMA is required to ensure that regulation encourages industry to respect community standards. There are a number of ways that the ACMA could regulate to achieve this goal. In respect of integrated advertising:

- > The ACMA could maintain the 'reasonable listener test' and during investigations of integrated advertising utilise the above research to inform its decisions as to when such advertising are more likely to be distinguishable as advertising.
- > The ACMA could prohibit integrated advertising (such as live reads) altogether.
- > The ACMA could regulate integrated advertising by explicitly stating when such advertising will be considered distinguishable, for example when:
 - > details of the commercial sponsor are contained at the start of the advertising (i.e. at the start of a live read or interview)
 - > the integrated advertisements have the tone and style of an advertisement.

Until recently, integrated advertising was prohibited in the United Kingdom (UK). The Ofcom Broadcasting Code 2005 provided that the only commercial references allowed on radio were sponsorship credits and 'spot ads' (advertisements broadcast in commercial breaks).³⁰

The new Ofcom Broadcasting Code 2010 is similar to Australia's Advertising Standard—allowing paid-for commercial references in radio programming (except in or around news bulletins and programs aimed at children) so long as these are appropriately 'signalled' to listeners.³¹ The new Ofcom code provisions do not explicitly state what 'signalling' is sufficient; although Ofcom's Guidance Notes to radio broadcasters indicate that four aspects should be considered: wording, positioning, frequency and identification of third parties (sponsors).³²

In addition to obvious advertising content (such as jingles and sponsorship announcements), the ACMA research found the common signals and cues for distinguishing advertising from other program content included:

- > the use of brand or product names
- > repetition of those names
- > provision of company contact details
- > overly detailed information and description
- > scripted feel (including a presenter's tone of voice).

The UK's shift from a strict prohibition to advertising regulation similar to the Advertising Standard may indicate that Australia's current regulation is appropriately aligned with international regulatory trends.

The ACMA is satisfied that the reasonable listener test can be meaningfully used when investigating complaints to determine when integrated advertising (such as advertising during interviews) is distinguishable. It follows that the test:

- ✓ is appropriately flexible to adjust to a range of advertising and circumstances.

²⁹ See CRA submission to the ACMA issues paper at page 20.

³⁰ See the Ofcom Broadcasting Code 2005 available at:

<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/> accessed on 31 January 2011.

³¹ See the Ofcom Broadcasting Code 2010 available at:

<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/> accessed on 31 January 2011.

³² See the Ofcom's Guidance Notes for radio broadcasters available at:

<http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/> accessed on 31 January 2011.

However, it is recognised that, in some circumstances, the use of integrated advertising will not:

- × meet the community standard that advertising should be distinguishable.

Industry needs to be responsive to the community standard in respect of making all integrated advertising distinguishable as advertising. The ACMA could encourage licensee responsiveness by making changes to the regulation of advertising to deal specifically with integrated advertising, particularly live reads.

Finding 1.5.4—The ‘reasonable listener test’ is an objective test that can be applied with flexibility. However, live reads are a particular advertising practice that results in listeners, in certain circumstances, having difficulty distinguishing the content as advertising.

1.6 Proposed reform options

Community attitudes research and responses to the ACMA issues paper demonstrate that regulation concerning advertising remains necessary and that there is room to improve existing regulation. The ACMA has identified two ways to address the findings in this chapter. They are:

1. vary aspects of the current program standard
2. revoke the current standard in favour of an industry code and carefully monitor the code development process.

The first action would see the current Advertising Standard varied according to the ACMA’s findings in this chapter. The exact features of this proposed variation would be determined following receipt of submissions on this paper including views on the costs and benefits of various changes. Any amendment to the standard will be provided in draft for further consultation.

The second action would see the current Advertising Standard revoked on the basis that industry develops a code to regulate advertising on commercial radio that meets community standards. As indicated earlier in this chapter, the move to an industry code would require favourable industry submissions and firm commitments to the development, negotiation and implementation of the code and its outcomes within a reasonable period.

To assist the ACMA in its deliberations on which reform option to proceed with, the ACMA welcomes submissions on both suggested reform options.

OPTION 1—Vary the current program standard to address the findings

There are a number of ways the current standard could be varied to address the findings in this chapter. The ACMA has developed a proposed variation, including a number of internal options, which it considers address the ineffective and inefficient aspects of the current standard. The ACMA welcomes submissions on the elements of the proposed variation, particularly with respect to the regulation of integrated advertising.

This proposed variation to the current Advertising Standard would:

1. Maintain the application of the standard to all program material.
2. Expand the definition of ‘consideration’ to include both direct and indirect benefits and interests.
3. Explicitly require advertising to be distinguishable at the time the commercial material is broadcast.

4. Regulate integrated advertising in one of the following ways:
 - A. maintain the 'reasonable listener test' but apply the research concerning listeners' particular difficulties in distinguishing integrated advertising in making its decisions
 - B. prohibit integrated advertising (such as live reads)
 - C. explicitly state in the program standard that integrated advertising must:
 - > contain details of the commercial sponsor at the start of the advertisement; and
 - > have the tone and style of an advertisement.

In respect of the objects and regulatory policy of the Act, variation of the current standard would:

- ✓ meet community standards by addressing more instances and practices that were identified as being of concern to listeners, by having a more comprehensive definition of consideration than the current standard
- ✓ provide more stable and predictable regulation than the current standard for licensees and listeners by explicitly requiring advertising to be distinguishable at the time of the broadcast
- ✓ impose similar financial and administrative burdens on radio broadcasters as is the case with the current program standard, including costs that are not unreasonable given the benefits to citizens.

It follows that the proposed variation of the current standard is considered to be effective, efficient and appropriate in so far as it would:

- ✓ work to provide community safeguards and support industry compliance
- ✓ be cost effective, maximising the benefits to citizens, taking account of the costs to industry
- ✓ achieve a balance between the needs of citizens and the level of regulatory burden imposed on licensees.

OPTION 2—Revoke the current standard in favour of an industry code

The findings of this chapter could be addressed while other benefits are delivered to industry—including for example the ability to accept and deal with complaints in the first instance—by replacing the program standard with an industry code. However, any lessening of the regulatory burden on licensees should not be at the expense of community safeguards. As discussed above, industry and community views on 'distinguishable' advertising are not closely aligned. This may mean that an industry code may not deliver appropriate community safeguards regarding advertising on commercial radio.

As indicated above (section 1.3) advertising was previously regulated by industry codes. The introduction of the Advertising Standard highlights the fact that regulation through program standards helps ensure that situations such as those identified in the *Commercial Radio Inquiry 2000* are not repeated. Direct monitoring and investigation by the ACMA, as well as education of station staff by licensees can help avoid systemic lapses. The regulation through program standards also mean that issues can be dealt with quickly and efficiently, as complaints are made directly to the ACMA.

It follows that in respect of the objects and regulatory policy of the Act, regulating advertising on commercial radio through an industry code would likely:

- × fail to meet community standards because of the gap between industry and listener views about what makes integrated advertising (such as live reads) distinguishable as advertising

- × fail to provide stable and predictable regulation for listeners because of the above disparity
- × impose financial and administrative burdens on radio broadcasters by requiring industry to develop a code (although this financial burden may be acceptable to licensees).

It follows that regulation through an industry code rather than a standard might prove to be ineffective, inefficient and inappropriate to the extent that it would:

- × not work to promote community safeguards
- × not be cost effective as the benefits to citizens may be diminished
- × not achieve a successful balance, because it leans more toward flexible, less burdensome regulation at the risk of not meeting the needs of citizens.

Accordingly, the ACMA would need to be confident that industry is committed to a future industry code on advertising that comprehensively addressed community safeguards. For example, an industry code might need to deal with integrated advertising in particular, have an expedited complaint process and/or include a reporting mechanism to the ACMA to ensure effective administration of the code. The ACMA is open to submissions on how industry code provisions could address the aforementioned issues.

If an industry code were to be introduced to regulate advertising on commercial radio, the ACMA would maintain a program standard until the code was developed and accepted. In this interim period, the ACMA would likely seek to amend the current standard in line with Option 1 above.

Consultation on the proposed reform options for the Advertising Standard

The ACMA is keen to receive submissions on the possible options for reforming the Advertising Standard.

1. What costs would result from:
 - > Varying aspects of the current standard?
 - > Revoking the standard in favour of an industry code?
2. What benefits would be gained by:
 - > Varying aspects of the current standard?
 - > Revoking the standard in favour of an industry code?
3. In respect of integrated advertising, how should the ACMA regulate to ensure that community standards are met?
 - A. Maintain the 'reasonable listener test'.
 - B. Prohibit integrated advertising (such as live reads)
 - C. Explicitly state in any regulation that integrated advertising must:
 - > contain details of the commercial sponsor at the start of the advertisement; and
 - > have the tone and style of an advertisement.

Submitters may be assisted in estimating the compliance costs of possible regulatory reforms by using the Business Cost Calculator, developed by the Department of Finance and Deregulation, available online at: www.finance.gov.au/obpr/bcc/index.html

2. Fair and accurate coverage of matters of public interest

2.1 Overview

This chapter sets out evidence supporting the need to regulate commercial influence and to encourage licensees to be responsive to the need for fair and accurate coverage of matters of public interest on commercial radio. It concludes that a program standard (rather than an industry code) is more suitable for promoting the fair and accurate coverage of matters of public interest on commercial radio.

Six elements of the current Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2000 are identified and each is assessed to determine the need for and scope of possible reform.³³ Finally, three possible reforms are presented: vary aspects of the standard but maintain the disclosure model; revoke the standard in favour of an industry code; or vary the standard informed by an editorial independence model.

2.2 Evidence of need and scope

Commercial radio retains its importance as a source of information and opinion for Australians, with 27 per cent of all radio listeners and 33 per cent of commercial radio listeners finding it an extremely or very important source of news and current affairs.³⁴ Fifty per cent of commercial AM talkback listeners identified talkback programming as similarly important in informing them about social, political or economic matters.³⁵ Research indicates there is broad agreement that talkback is one of the main vehicles for informing radio listeners and bringing issues to the attention of citizens.³⁶ There is also a strong view that commercial radio presenters should address the important public interest obligations at stake when presenting commercial radio program formats involving news and current affairs.³⁷

Attitudinal research demonstrates that no matter the program format concerned, 81 per cent of commercial radio listeners agree that the on-air opinions of radio personalities should not be influenced by their personal sponsorship deals.³⁸ Fifty-five per cent of commercial radio listeners think that it is extremely or very important for them to be informed of commercial agreements made with radio personalities.³⁹

Submissions to the ACMA's issues paper generally supported the need for regulation of commercial influence on matters of public interest on commercial radio. The submissions and research, taken together, do not support removing the regulation of commercial influence on matters of public interest.

Possible economic impact

The economic impacts of strengthening, relaxing or revoking the Disclosure Standard are difficult to estimate. Strengthening the Disclosure Standard may reduce revenue to

³³ Referred to in the remainder of this chapter as 'the Disclosure Standard'.

³⁴ *Community Attitudes to Radio Content 2010* at pages 49 and 53.

³⁵ *Community Attitudes to Radio Content 2010* at pages 49 and 53.

³⁶ *Review of Literature on Commercial Influence in News and Current Affairs Programs on Commercial Radio 2010* at pages 18 and 27–28.

³⁷ *Review of Literature on Commercial Influence in News and Current Affairs Programs on Commercial Radio 2010* at pages 18 and 27–28.

³⁸ *Community Attitudes to Radio Content 2010* at page 45.

³⁹ *Community Attitudes to Radio Content 2010* at page 52.

presenters from presenters' commercial agreements. However, analysis of the effect of the Disclosure Standard from 2001 indicates this might be mitigated by an increase in paid advertising revenue to licensees (directed to traditional advertising spots rather than commercial arrangements involving presenters). In other words, strengthened regulation of presenters' commercial agreements may cause advertisers to prefer the more traditional advertising arrangements.

Conversely, relaxing or removing the Disclosure Standard may cause advertisers to prefer and engage in more commercial agreements involving presenters. This in turn may provide a concurrent fall in advertising revenue to licensees.⁴⁰

2.3 Is there a benefit in maintaining a program standard?

Given the importance listeners place on commercial radio services to provide coverage of public interest matters, the ACMA is satisfied that there remains a need for regulation of commercial influence in this area. As part of this review, the ACMA is reconsidering whether a program standard remains the most appropriate way to encourage licensees to be responsive to the need for fair and accurate coverage of public interest material. Alternatively, the re-introduction of an industry code may be suitable.

Under section 125 of the Act, the ACMA must determine a program standard where it is satisfied that one of the following is the case:

- > there is convincing evidence that a code of practice registered is not operating to provide appropriate community safeguards for a matter referred to in subsection 123(2) of the Act
- > no code of practice has been registered for a matter referred to in subsection 123(2) of the Act.

In deciding whether standards or codes are the most appropriate regulatory mechanism,⁴¹ the ACMA is also informed by its assessment framework for optimal conditions for effective self- and co-regulatory arrangements.⁴² Again, as referred to above in section 1.3, the optimal conditions can be grouped into two main categories:

1. **Environmental conditions** primarily relating to market and industry circumstances and whether these indicate that industry participants have the incentives and ability to work together effectively to address the issue.
2. **Features of the regulatory scheme** relating to its operation and enforcement.

To revoke the Disclosure Standard in favour of regulation by an industry developed code of practice, the ACMA would need to have confidence that an industry code could operate to provide appropriate community safeguards. The Disclosure Standard would continue to operate until any such code were developed.

Before the introduction of the Disclosure Standard, commercial influence in public interest programs, specifically news and current affairs programs was regulated by co-regulatory industry codes. However, the *Commercial Radio Inquiry 2000* found a significant failure in the co-regulation of these matters, as undisclosed commercial relationships between presenters, advertisers and licensees existed which had influenced the content of programs.⁴³ Compliance with the relevant code provisions

⁴⁰ Reform of the Commercial Radio Standards: A Review of the Expected Economic Costs 2010 at page 2.

⁴¹ This decision is in accordance with section 125 of the Act.

⁴² As contained in the ACMA's occasional paper *Optimal conditions for effective self- and co-regulatory arrangements*, 2010. Available at: www.acma.gov.au/WEB/STANDARD/pc=PC_312187.

⁴³ *Commercial Radio Inquiry 2000* at page 30.

was found to be inadequate as was industry understanding of the code requirements.⁴⁴ The Disclosure Standard was determined, emphasising the principle that the 'public is entitled to assume that the information content of commercial radio is disinterested except where an interest is disclosed'.⁴⁵

Since 2000, there have only been a small number of investigations regarding compliance with the Disclosure Standard. Industry asserts that the problem is now isolated to individual licensees or presenters. While it is true that there have been only a few formal investigations into the standard, those investigations have led to a large number of separate breach findings.⁴⁶

Further, the ACMA research indicates that citizens still have substantial concerns about commercial influence in public interest material on commercial radio. These factors indicate that a program standard remains an appropriate way to regulate commercial influence in the coverage of public interest material.

However, the ACMA welcomes further submissions on this matter including whether the optimal conditions do exist for regulation of commercial influence by code provisions, or there remains an expectation that commercial influence be regulated through a program standard.

Finding 2.3.1—The Disclosure Standard has provided community safeguards suitable to the regulation of commercial influence in the coverage of matters of public interest on commercial radio.

2.4 The current standard

The object of the current Disclosure Standard is to 'encourage commercial radio broadcasting licensees to be responsive to the need for fair and accurate coverage of matters of public interest by requiring the disclosure of commercial agreements that have the potential to affect the content of current affairs programs'. The Disclosure Standard has the following elements:

1. It applies to current affairs programs only.
2. It defines 'commercial agreements' and 'consideration'.
3. It relates to commercial agreements entered into by program presenters.
4. It imposes no requirement for separation of commercial and other material, so long as there is disclosure.
5. It requires on-air disclosure at the time of broadcast and in a prescribed scripted form.
6. It requires licensees to:
 - > keep a public register of commercial agreements between sponsors and presenters of current affairs programs
 - > notify the ACMA of such agreements.

2.5 Scope of any reform

In considering the scope of any reform, the ACMA's focus is on the following questions:

⁴⁴ *Commercial Radio Inquiry 2000* at page 2.

⁴⁵ *Commercial Radio Inquiry 2000* at page 43.

⁴⁶ Within the nine formal investigations published on the ACMA website as at October 2010, 49 separate breaches of the Disclosure Standard were found.

- > What program formats containing matters of public interest should regulation apply to?
- > Is the definition of 'commercial agreement' adequate?
- > Whose agreements should a commercial radio licensee be responsible for?
- > What is the best way to support transparency?
- > What form and timing requirements should apply if there is on-air disclosure?
- > What register and notification arrangements are appropriate?

2.5.1 What program formats containing matters of public interest should regulation apply to?

The object of the Disclosure Standard is to encourage licensees to be responsive to the need for fair and accurate coverage of matters of public interest. The current regulation applies only to current affairs programs, defined as programs:

a substantial purpose of which is to provide interviews, analysis, commentary or discussion, including open-line discussion with listeners, about current social, economic or political issues.⁴⁷

Only programs within the above definition are subject to disclosure requirements. In an increasingly converged media environment, this might not promote the fair and accurate coverage of all matters of public interest on commercial radio. The reality of commercial radio is that the broadcast of matters of public interest is not confined solely to news or current affairs formats; coverage of public interest material can occur in a range of different formats and often within entertainment programs.

In the United States, UK and Ireland, commercial influence regulation applies irrespective of the substantial purpose of the program or whether the material broadcast is a matter in the public interest.⁴⁸ In the United States, sponsorship identification is required in all programs, while the UK and Ireland rely on editorial independence (complete separation of editorial content and advertising) in all programming.⁴⁹

A number of submissions to the ACMA issues paper supported the extension of the Australian disclosure regime to all genres and material. For example, the CLC submitted:

It should extend to all program formats and to all types of advertising and sponsorship arrangements or other circumstances that could occasion undue influence over program content. By broadening the standard to apply consistently and comprehensively, broadcasters (and the community as a whole) will have greater certainty. Industry compliance will be simplified.⁵⁰

In contrast, CRA submitted that any regulation relating to disclosure should be limited to current affairs programs only.⁵¹ Further, it was submitted that disclosure should be limited to opinion-makers:

The Disclosure Standard was introduced to address concerns relating to current affairs programs, which were seen as key opinion influencers. Accordingly, the objective of the

⁴⁷ Section 5 of the Disclosure Standard.

⁴⁸ *International Regulation of Advertising, Sponsorship and Commercial Disclosure for Commercial Radio Broadcasting 2010* at page (xxi).

⁴⁹ *International Regulation of Advertising, Sponsorship and Commercial Disclosure for Commercial Radio Broadcasting 2010* at page (xxii).

⁵⁰ CLC submission to the ACMA issues paper at page 5. Supported by the Hobart Community Legal Service submission to the ACMA issues paper.

⁵¹ CRA submission to the ACMA issues paper at page 14.

Disclosure Standard is to achieve disclosure of direct commercial arrangements with on-air opinion-makers in circumstances in which those arrangements could impact on editorial content.⁵²

Research has shown that commercial radio listeners are concerned about commercial influence in non current affairs programming as well as current affairs programming.⁵³ Over 54 per cent believe that it is very or extremely important that radio personalities (not just current affairs presenters) inform listeners who their sponsors are.⁵⁴

Noting the identified community standard, and that material of public interest can be covered in programs other than current affairs programs, it could be argued that the regulation should apply to *all programs* on commercial radio. On the other hand, it could be argued such an outcome may be directed at meeting the needs of citizens at the cost of imposing an unreasonable regulatory burden on industry. To address the needs of citizens, but still provide a balance for industry, regulation could apply to a wider range of programs (but not all programs).

One possibility would be to include factual programs as well as current affairs programs. In this regard, it can be noted that the commercial television industry has adopted the following definition of 'factual program' in its industry code:

'Factual program' means a current affairs, documentary or infotainment program broadcast by the licensee.

...

'Infotainment program' means a program the sole or dominant purpose of which is to present factual information in an entertaining way, and which employs presenters to do so.⁵⁵

Documentaries are more generally television rather than radio programs, so that element of the above definition could reasonably be excluded for the purposes of regulating commercial radio. However, the inclusion of infotainment programs in addition to current affairs programs widens the regulation of commercial influence in matters of public interest, promoting adherence to the community standards mentioned above.

The ACMA is satisfied that the application of the current regulation only to current affairs programs:

- × is unlikely to effectively respond to the need for fair and accurate coverage of matters of public interest because it does not apply to all coverage of public interest material on commercial radio
- × fails to meet community standards that commercial influence should be disclosed in all material of public interest on commercial radio.

Moreover, current regulation is ineffective and inappropriate to the extent that:

- × it does not work to adequately promote community safeguards because of its limited application
- × it fails to achieve an appropriate balance between the needs of citizens and the imposition of regulatory burden on licensees.

⁵² CRA submission to the ACMA issues paper at page 14.

⁵³ *Community Attitudes to Radio Content 2010* at page 51-52.

⁵⁴ *Community Attitudes to Radio Content 2010* at page 51.

⁵⁵ Clause 1.19 of the Commercial Television Industry Code of Practice January 2010.

Finding 2.5.1—The application of the regulation only to current affairs programs does not adequately meet community standards about commercial influence in matters of public interest.

2.5.2 Is the definition of 'commercial agreement' adequate?

The current Disclosure Standard covers any 'commercial agreement' and defines this to mean:

An agreement, arrangement or understanding, whether committed to writing or not:

- (a) one of the purposes of which is that a presenter or part-time presenter or an associate of a presenter or a part-time presenter:
 - (i) promotes a third party and/or its products or services or interests, or
 - (ii) refrains from making negative comments about a sponsor, or
 - (iii) provides consultancy services in respect of publicity, promotion or public relations,
in exchange for any benefit or valuable consideration; or
- (b) which imposes obligations on a presenter or part-time presenter to provide services and pursuant to which the presenter or part-time presenter or an associate of a presenter or part-time presenter, receives from a person other than a licensee, any benefit or consideration of \$25,000 or more per annum.

A commercial agreement does not include an agreement, arrangement or understanding between only a presenter or part-time presenter and an associate of the presenter or part-time presenter.

'Consideration' is defined in the same way as in the Advertising Standard, that is: 'any valuable consideration other than the provision, at no charge, of a product or service solely for review'. 'Benefit' is not defined in the Disclosure Standard.

As discussed in the previous chapter on advertising, investigations conducted by the ACMA have illustrated the difficulty in determining whether consideration has been provided under a commercial agreement.

It is appropriate that the definition of 'commercial agreement' and 'consideration' be modified in the way proposed in the discussion of the Advertising Standard (above at section 1.5.2).

A more comprehensive definition of 'commercial agreement', particularly the definition of 'consideration', would assist in promoting community safeguards in a wider range of circumstances. For example, the definition of consideration could explicitly include both direct and indirect benefits or interests. For example, the definition could be:

Any money, service or other valuable consideration or benefit that is directly or indirectly paid, or promised to or charged or accepted in respect of the material broadcast.

Finding 2.5.2—The definition of 'commercial agreement' would be improved by having a clearer and more comprehensive definition of 'consideration'.

2.5.3 Whose agreements should a commercial radio licensee be responsible for?

The definition of commercial agreement in the current standard focuses primarily on the actions of presenters or part-time presenters in exchange for benefit or valuable consideration (for example promoting a sponsor/product/service/interest or refraining

from negative comments about a sponsor). Therefore, commercial agreements that are not covered include those that:

- > do not explicitly require a presenter to promote a sponsor
- > do not explicitly require a presenter to refrain from commenting on a sponsor
- > do not direct the benefit or consideration to a presenter.

Investigations into the Disclosure Standard have shown that commercial arrangements not covered by the definition can influence material of public interest on commercial radio. For instance, in 2004 the Australian Broadcasting Authority (ABA) found that Telstra paid Harbour Radio Pty Ltd (licensee of 2GB) to ensure current affairs presenter Mr Alan Jones made announcements regarding Telstra products. This arrangement was not disclosed, but there was no breach of the Disclosure Standard because:

- A. Mr Jones was not party to the agreement, which was between Telstra and Macquarie Radio Network (the parent company of the licensee).
- B. The payment of consideration under the agreement was to Macquarie Radio Network, not Mr Jones.
- C. The terms of the agreement did not impose any editorial restrictions or obligations on Mr Jones.⁵⁶

While Mr Jones did not directly receive consideration under the agreement, he did own shares in Macquarie Radio Network and was entitled to 20 per cent of the increase in value of Macquarie Radio Network that might occur as a result of his role as presenter on 2GB.

The ABA also indicated in the investigation that Mr Jones' on-air commentary on Telstra (which was previously critical) became predominantly positive, supporting Telstra's service standards, public image and credibility at the time the agreement between Telstra and Macquarie Radio Network was in place. The ABA also noted that Mr Jones' views on the privatisation of Telstra changed over time.

This example and the ACMA research (discussed above in section 2.2) highlight that for community standards to be met, the same disclosure standards should apply, irrespective of whether a commercial arrangement is with a program presenter or a licensee. This supports the view that the scope of the disclosure regulation should be extended.

The CLC submitted that regulatory safeguards should capture any person who is in a position to influence the content of a program.⁵⁷ In contrast, CRA argued against extending the scope of any disclosure regulation to 'all commercial agreements with the potential to affect program content' because, they said, it would be impossibly vague and onerous.⁵⁸

In the United States, the 'payment-disclosure rule' requires any employee or person involved with the production or preparation of program content to disclose if they receive consideration for the content broadcast.⁵⁹ Any person who provides such consideration must also disclose it.⁶⁰

⁵⁶ See the investigation report available at: www.acma.gov.au/WEB/STANDARD/pc=PC_310230.

⁵⁷ CLC submission to the ACMA issues paper at page 5.

⁵⁸ CRA submission to the ACMA issues paper at page 15.

⁵⁹ *International Regulation of Advertising, Sponsorship and Commercial Disclosure for Commercial Radio Broadcasting* 2010 at page 50.

⁶⁰ *International Regulation of Advertising, Sponsorship and Commercial Disclosure for Commercial Radio Broadcasting* 2010 at page 50.

In the Australian regulatory context, regulating anyone beyond the licensee must be addressed in a way that is consistent with the legislative framework. As noted in the *Commercial Radio Inquiry 2000*, the obligation must rest with the licensee, as the holder of the licence:

It is fundamental to the regulatory scheme of the Act that it is concerned with the regulation of licensees, and not directly with their employees or presenters. In the [...] disclosure standard, the Authority has addressed the need for presenters to disclose their agreements to licensees by requiring licensees to make such disclosure a condition of their employment.⁶¹

Provided there is a relationship between the licensee and the person whose arrangements need to be managed, the disclosure standard can apply to persons other than presenters of current affairs programs.

Accordingly, the application of the current regulation only to presenters or presenters when they are a party to the agreement:

- × fails to respond to the need for fair and accurate coverage of matters of public interest because it does not cover commercial arrangements that involve persons other than presenters who can influence program content, or where presenters are not party to the agreement but have an interest in the licensee
- × fails to meet community standards that all commercial agreements that can influence content should be disclosed—no matter who is party to the agreement.

It follows that the current regulation is ineffective to the extent that:

- × it does not work to provide adequate community safeguards.

Finding 2.5.3—By not applying to situations where presenters (or other persons with significant influence on program content) have an actual or beneficial interest in the licensee company but are not party to licensee agreements, the current regulation fails to provide adequate community safeguards.

It is arguable that the application of the regulation needs to be widened in order to provide adequate community safeguards. However, the ACMA is reluctant to extend the scope of the regulation in a way that would make it unnecessarily difficult or costly to administer.

A balance could be achieved if licensees were required to be responsible for:

- > presenters' agreements (as they are now under the current standard)
- > licensees' agreements where a relevant presenter has an actual or beneficial interest in the licensee company
- > any other agreements where the person concerned has significant influence on the content of material broadcast. The onus would be on the licensee to determine, in the first instance, who are the persons associated with the broadcaster that significantly or potentially influence program content.

This change addresses the particular situations described above and also covers persons other than presenters without the ACMA prescribing who are the persons with influence at a station (as they may be different persons for different stations). The ACMA is satisfied that while this widening of the regulation would increase the administrative burden for licensees, this burden would be in proportion to the

⁶¹ *Commercial Radio Inquiry 2000* at page 6.

associated promotion of community safeguards. Further, licensees would themselves be assessing perceived or actual bias according to well known standards.⁶²

2.5.4 What is the best way to support transparency?

Commercial influence on programming can be made transparent to audiences through two main mechanisms: disclosure of commercial arrangements or separation of commercial and editorial content. The current Disclosure Standard does not require the separation of commercial and program content. Instead, to ensure listeners are aware of commercial influence, it requires on-air disclosure of the relevant commercial agreements in respect of current affairs programs.

In the UK, Ireland and Canada, editorial independence has been preferred to disclosure. In the UK and Ireland, the complete separation of editorial and other radio content is required in all programs, while in Canada separation is only required for public interest radio programs.⁶³

In its response to the issues paper, the CLC argued in favour of such editorial independence for the regulation of commercial radio in Australia stating that:

Disclosure is not sufficient to remedy the harm caused by a lack of editorial independence in commercial radio programming. Although disclosure made contemporaneously informs the listener that a commercial interest is trying to influence them with respect to their product, it does not address the harm caused by the influence of sponsors or advertisers on the selection and presentation of program material. The introduction of a requirement for editorial independence would ensure that broadcasters cover matters of public interest fairly and accurately by removing selection bias in programming and bias in presentation.⁶⁴

The submission from CLC indicates the two ways commercial interests can influence programming—in the selection of programming and in the presentation of content. Generally, editorial independence regulations would prevent both biases. In contrast, the current Disclosure Standard requires licensees to make clear to listeners that commercial interests have influenced the programming as presented—through on-air disclosure announcements and registers of relevant commercial agreements.

The ACMA's community research indicates that transparency is important to commercial radio listeners, with 74 per cent believing that disclosure announcements were useful to some degree in informing them that 'what the announcer is saying might be influenced'.⁶⁵ Research was not conducted on whether listeners would favour a prohibition of all commercial influence in programming and presentation over the current disclosure model.

While on-air disclosure is not the only way to achieve transparency, in Australia the disclosure model has been shown to:

- ✓ meet the community standard that listeners should be aware of commercial influence to the extent that on-air disclosure announcements are heard and understood by listeners
- ✓ provide stable and predictable regulation, considering that licensees and listeners are accustomed to disclosure announcements.

⁶² The legal definitions of actual and perceived bias are well known, particularly in respect of corporation law.

⁶³ *International Regulation of Advertising, Sponsorship and Commercial Disclosure for Commercial Radio Broadcasting 2010* at page (xxi).

⁶⁴ CLC submission to the ACMA issues paper at page 3.

⁶⁵ *Community Attitudes to Radio Content 2010* at page 59.

It follows that the ACMA is satisfied that the disclosure model has been effective, efficient and appropriate in so far as it:

- ✓ works to promote community safeguards and support licensee compliance
- ✓ is cost effective, maximising the benefits to citizens while taking account of the costs to industry
- ✓ achieves a balance between the needs of citizens and the regulatory burden on industry.

Notwithstanding this, requiring editorial separation remains open as an option for reforming the Disclosure Standard and is a relevant line of enquiry for the first principles approach adopted in this review. This is true despite the fact that the introduction of an editorial independence model in Australia would require a rethink by the commercial radio industry of many aspects of its operation including entrenched business and sales models.

Given the disclosure model has been in place for a decade, it is clear that listeners are familiar with its application. Therefore, change would affect listeners as well as industry. On the other hand, the current Disclosure Standard does have some ineffective, inefficient or inappropriate elements and the shift to an editorial independence model would be one way to address these issues. For example, the concerns associated with the form and timing of disclosure announcements (discussed in section 2.5.5 below) would become irrelevant under an editorial independence model where commercial influence is prohibited.

Finding 2.5.4—Editorial independence and disclosure are two alternative mechanisms that can help ensure the fair and accurate coverage of matters of public interest. To date, the Disclosure Standard has supported transparency of commercial influence in the presentation of material of public interest on commercial radio.

2.5.5 What form and timing requirements should apply if there is on-air disclosure?

The current Disclosure Standard requires a disclosure announcement to be made ‘at the time of, and as part of’ each instance of the broadcast of sponsor-related material. The rationale of an announcement *at the time of* the sponsored material is the clarity and immediacy of the link between the material presented and the sponsor concerned. Further, the standard prescribes six scripted phrases for disclosure announcements:

1. [name of sponsor] is a sponsor of mine
2. I have a commercial agreement with [name of sponsor]
3. [name of sponsor] is a sponsor of my company, [name of company]
4. [name of sponsor] has a commercial agreement with my company, [name of company]
5. [name of sponsor] is a sponsor of a company of which I am a director, [name of company]
6. [name of sponsor] has a commercial agreement with a company of which I am a director, [name of company].

The prescribed disclosure announcements are designed to ensure that the presenter makes a first-person declaration that a commercial agreement exists, and that listeners can identify and understand the announcement as such a declaration.

There are mixed views among commercial AM talkback listeners about the usefulness and importance of on-air disclosure announcements with over a third (36 per cent) of

those surveyed regarding on-air disclosure announcements in talkback programs as extremely or very useful.⁶⁶

With respect to the timing of disclosure announcements, almost half (49 per cent) of commercial AM radio talkback listeners indicated that it was extremely or very important that disclosure announcements be made at the same time that an announcer mentions a commercial sponsor.⁶⁷ Of particular interest is the noticeable drop in the level of commercial radio listeners' concern about commercial influence when disclosure announcements are 'at the same time as the relevant commentary' (53 per cent) rather than 'at some point in the program' (63 per cent).⁶⁸ This drop in the level of concern was the same for two different advertising practices: favourable commentary during a talkback program; and a live read scripted advertisement during commentary or discussion.⁶⁹

Submitters to the ACMA issues paper had differing views on the appropriate timing of disclosure announcements. CRA noted that no other media sector is burdened with such a high level of regulation. CRA preferred a model that places the commercial radio industry in a position of regulatory parity with commercial television, whereby disclosures can be made either at the beginning, end, or during the relevant program. In particular, CRA argued that current disclosure requirements are unnecessary, prescriptive and burdensome, proposing that:

...a better way of disclosing arrangements would be through publication on the station website. This would enable listeners to check whether arrangements exist at all times and would address the concern that listeners might miss announcements. While the effectiveness of disclosure announcements might not be clear, the impact that imposing a prescriptive disclosure regime has on licensees is clearly extremely costly and burdensome. The industry questions the logic of maintaining this burden, particularly in the face of limited evidence regarding its effectiveness.⁷⁰

Regarding the form of disclosure announcements, all submitters agreed that the regulation should be relaxed but there was no consensus as to the extent of relaxation. CRA submitted:

The commercial radio industry strongly opposes the current requirement that announcers must use prescribed words. The industry is not aware of any other medium that must comply with such an obligation. Nor is it aware of any other jurisdiction in which such an obligation is imposed.⁷¹

The CLC agreed that the 'set menu' of disclosure statements should be broadened to make compliance easier while retaining the current clarity and ease of understanding for the benefit of the listener.⁷²

Analysis shows that the timing requirements in the current regulation:

- ✓ meet the community standard demonstrated in the research that listeners are less concerned about commercial influence when disclosure announcements are made at the same time as the commercial mention
- ✓ provide stable and predictable regulation for licensees and listeners.

⁶⁶ *Community Attitudes to Radio Content 2010* at page 58.

⁶⁷ *Community Attitudes to Radio Content 2010* at page 58.

⁶⁸ *Listener Attitudes to Advertising, Sponsorship and Influence on Commercial Radio 2010* at page 47.

⁶⁹ *Listener Attitudes to Advertising, Sponsorship and Influence on Commercial Radio 2010* at page 47.

⁷⁰ CRA submission to the ACMA issues paper at page 16.

⁷¹ CRA submission to the ACMA issues paper at page 17.

⁷² CLC submission to the ACMA issues paper at page 7.

The current regulation is effective, efficient and appropriate to the extent it:

- ✓ works to provide community safeguards
- ✓ is cost effective, maximising the benefits to citizens while taking account of the costs to industry
- ✓ achieves a balance between needs of citizens and the regulatory burden.

However, the current requirement on the form of announcements (the six acceptable phrases) is ineffective and inefficient in so far as it:

- × is not flexible for licensees, given the requirement that announcements must be in one of the six acceptable forms
- × is not cost effective, because it imposes unnecessary financial and administrative burdens on licensees.

Finding 2.5.5—Where on-air disclosure is required, its timing is important to the promotion of community standards, but strict prescription of the form of announcements imposes financial and administrative burdens on licensees without furthering the needs of citizens, and is less flexible than may be appropriate.

Relaxing the form requirements would ease the burden for commercial radio licensees. For example, regulation could provide that an ‘identifiable sponsorship announcement’ must be made, which makes clear to the listener that there is a relevant commercial relationship.

2.5.6 What register and notification arrangements are appropriate?

Commercial radio licensees are subject to relatively detailed register and notification requirements under the current Disclosure Standard. The register requirements include:

- > keeping a register of current commercial agreements between sponsors and presenters
- > making the register available at the station premises for inspection, free of charge, upon request by any member of the public
- > publishing the register on any website operated by or on behalf of the licensee
- > providing the particulars set out in the register to the ACMA within 14 days after the licensee is notified of those particulars by a presenter.

Notifications to the ACMA are required when a licensee becomes aware of a commercial agreement or any changes to an existing commercial agreement. Notifications to the ACMA must include:

- > the date of the commercial agreement
- > the parties to the agreement
- > a brief description of the obligations of the presenter under the agreement
- > an indication of the amount or value of the benefit or consideration to be provided under the agreement.

The current register and notification requirements are viewed by industry as imposing an unnecessary financial and administrative burden on licensees. CRA submitted in response to the issues paper that, amongst other things, making the register available both at station premises and online is unduly burdensome, as are the timing requirements for notification of agreements to the ACMA, concluding that:

...the register and notification requirements of the Disclosure Standard ...extend far beyond the level needed to inform listeners of the existence of a commercial interest.⁷³

The CLC has argued in favour of retaining the register requirements at least, as it acts as a supporting mechanism for on-air disclosure and public accessibility to disclosure information.⁷⁴

The ACMA did not conduct any research into community attitudes to the register and notification requirements. However, maintaining at least some requirement for a public register would match the community standard identified earlier that listeners expect to know when there is commercial influence in the coverage of matters of public interest on commercial radio.

The ACMA questions whether requiring the availability of a hard-copy register at station premises, in addition to requiring an online register, is still necessary given the ubiquity of online information. The availability of an online register, and a requirement to provide information on request should be sufficiently convenient for citizens to seek and gain relevant information. Further, where accurate online registers are maintained and licensees provide information on request to the ACMA, it would not seem to be necessary to also maintain notification requirements in order to effectively meet the needs of citizens.

It is arguable that the current register and notification requirements:

- ✓ promote the community standard that listeners want to know when there is commercial influence involved
- × fail to provide appropriate flexibility for licensees
- × impose unnecessary financial and administrative burdens on licensees.

It follows that the current regulation is inefficient and inappropriate to the extent that it:

- × is not cost effective, the cost to industry in maintaining a public register at station premises as well as online *and* notifying the ACMA, outweighs the benefits to citizens in having a public register
- × fails to achieve a balance between the needs of citizens and regulatory burden, because of the strict requirements on licensees in the regulation.

Finding 2.5.6—Availability of a publicly accessible online register of commercial arrangements allows citizens to access relevant information, promoting community standards without imposing unnecessary financial and administrative burdens on licensees.

Relaxing the public register and notification requirements would achieve a balance in this area. At least, the ACMA would expect licensees to maintain a public register online to inform citizens of relevant arrangements and agreements.

A website register provides benefits to citizens without an excessive financial and administrative burden for the licensee. The public register could also be utilised by the ACMA when investigating complaints about commercial influence—making it possible to remove the current notification requirements. The ACMA would also likely impose a requirement that the licensee provide information currently covered by the notification requirement on request. This would minimise the information management, financial and administrative burden in this area.

⁷³ CRA submission to the ACMA issues paper at page 18.

⁷⁴ CLC submission to the ACMA issues paper at page 6.

2.6 Proposed reform options

Community attitudes research and responses to the ACMA's issues paper and experience demonstrate that regulation concerning commercial influence in material of public interest on commercial radio is expected, needed and desirable. The ACMA has identified three alternative ways to address the findings in this chapter. They are:

1. vary aspects of the current program standard but maintain a disclosure model
2. revoke the current standard in favour of an industry code
3. vary the current standard to favour an editorial independence model.

The first action would see aspects of the current Disclosure Standard varied in line with the findings in this chapter. The exact features of this proposed variation would be determined following submissions on this options paper, but would maintain disclosure as a key feature. Any proposed amendment to the standard would be provided in draft for further consultation.

The second action would see the current Disclosure Standard revoked and industry develop a code for regulating commercial influence in material of public interest. As indicated earlier in this chapter, if there is a move to an industry code, the ACMA would need to be confident that industry is committed to a co-regulatory code on commercial influence that comprehensively addresses community concerns.

The third action would see the current Disclosure Standard changes so that it was informed largely by an editorial independence model rather than a disclosure model. While this option would require adjustment by industry and citizens, it would provide high-level community safeguards.

To assist the ACMA in its deliberations on which of the above reform to proceed with, the ACMA welcomes submissions on all suggested reform actions.

OPTION 1—Vary aspects of the current program standard, maintaining the disclosure model

There are a number of ways the current Disclosure Standard could be varied to address the findings in this chapter. The ACMA considers this proposed variation, including some internal options, addresses the ineffectiveness, inefficiency and inappropriateness of the current standard identified throughout this chapter. The ACMA welcomes submissions on the elements of this proposed variation, particularly whether it should apply to factual programs or all public interest material broadcast.

This proposed variation to the current Disclosure Standard would:

1. Expand its application to cover more than just current affairs programs, in order to cover other material of public interest. Regulation could:
 - A. apply to factual programs, including current affairs and infotainment programs. Current affairs programs would be defined as in the current standard. Infotainment programs would be defined as meaning 'a program that has the dominant purpose of presenting factual material in an entertaining way'; OR
 - B. apply to all public interest material whenever broadcast, regardless of the format of the program.
2. Expand the definition of 'consideration' to include both direct and indirect benefits and interests.
3. Expand the application of the regulation to require licensees to be responsible for all of the following:
 - > presenter's agreements (same as the current definition)

- > licensee's agreement where a relevant presenter has an actual or beneficial interest in the licensee company
 - > any other agreements where the person concerned has significant influence on the content of material broadcast. The onus will be on the licensee to determine, who are the persons associated with the broadcaster that may significantly influence program content.
4. Maintain the disclosure requirement—separation of commercial and other content would not be required so long as an on-air disclosure announcement is made.
 5. Relax the prescription of the form of on-air disclosure announcements by removing the list of acceptable phrases. Instead require an 'identifiable sponsorship announcement' co-incident with the relevant content that makes clear to listeners that there is a relevant commercial relationship.
 6. Relax the register and notification requirements. Require licensees to keep a public online register—for the information of citizens and the ACMA and to provide further information to the ACMA on request.

In respect of the objects and regulatory policy of the Act, varying the current standard would:

- ✓ meet community standards by addressing more instances and practices of concern to listeners, than addressed by the current standard
- ✓ ensure the fair and accurate coverage of matters of public interest because it would apply to more broadcast material and commercial arrangements, capturing more public interest matter and more industry practices than the current standard
- ✓ provide stable and predictable regulation for licensees and listeners
- ✓ reduce administrative and financial burdens on licensees through relaxed notification requirements, as compared to the current standard.

It follows that this option is considered to be effective, efficient and appropriate in so far as it would:

- ✓ work to provide community safeguards and support industry compliance
- ✓ maximise the benefits to citizens, taking account of the costs
- ✓ achieve a balance between the needs of citizens and imposing a regulatory burden on licensees.

OPTION 2—Revoke the current standard in favour of an industry code

The findings set out in this chapter could be addressed while other benefits are delivered to industry—including for example the ability to accept and deal with complaints in the first instance—by replacing the program standard with an industry code. However, any lessening of the regulatory burden on licensees should not be at the expense of community safeguards. A necessary consequence of a move to an industry code is a reduction in oversight by the regulator. Given the significance of breach findings in respect of the Disclosure Standard, this reduced oversight may mean that a code will not ensure the fair and accurate coverage of matters of public interest.

Regulation through program standards helps ensure that:

- > situations such as those identified in the *Commercial Radio Inquiry 2000* are not repeated, because of:
 - > direct monitoring and investigation
 - > avoiding systemic lapses through education and compliance.
- > issues can be dealt with quickly and efficiently as complaints can go straight to the ACMA

- > the seriousness and importance of the issue, as well as compliance with the requirements are recognised.

It follows that in respect of the objects and regulatory policy of the Act, regulating commercial influence on commercial radio through an industry code may:

- × fail to meet community standards if commercial imperatives and programming came into conflict with community concern
- × fail to provide stable and predictable regulation for listeners as a result
- × impose financial and administrative burdens on radio broadcasters by requiring industry to develop a code (although these costs may be acceptable to licensees).

It follows that regulation through an industry code rather than a standard might prove to be ineffective, inefficient and inappropriate to the extent that it would:

- × not work to promote community safeguards
- × not achieve a successful balance, leaning more toward flexible, less burdensome regulation at the risk of not meeting the needs of citizens
- × not be cost effective as the benefits to citizens may be diminished.

In order to overcome these significant challenges, the ACMA would need to be confident that industry was committed to a future industry code on commercial influence that comprehensively addressed community concerns. For example, an industry code may need to have an abbreviated complaint process or include a reporting mechanism to the ACMA. The ACMA is open to submissions on how industry code provisions could address the aforementioned issues.

If an industry code were to be introduced to regulate commercial influence on commercial radio, the ACMA would maintain a program standard until the code was developed and accepted. In this interim period, the ACMA would likely move to amend the current standard in line with Option 1 above.

OPTION 3—Vary the current standard in favour of an editorial independence model

The ACMA notes that in other jurisdictions editorial independence is seen as an effective way to avoid undisclosed commercial influence. Like the UK and Ireland, Australia could regulate commercial influence and achieve transparency through editorial independence.

An editorial independence model would broaden the application of the current standard by prohibiting any sponsorship of news programs and requiring impartiality of editorial material. Disclosure announcements would be redundant under this model and any content giving undue prominence to commercial entities or products would be prohibited. This model would ensure that programs and programming decisions are not distorted for commercial purposes and would place a heavy emphasis on the needs of citizens in this regard.

In respect of the objects and regulatory policy of the Act, regulation enshrining editorial independence would:

- ✓ respond to the need for fair and accurate coverage of matters of public interest by prohibiting any commercial influence on programming
- ✓ meet the community standard that listeners should be aware of commercial influence if it exists
- × compared to the current standard, not (at least initially) be stable and predictable for licensees and listeners as they are accustomed to the disclosure model

- × compared to the current standard, impose increased and possibly unnecessary financial and administrative burdens on licensees through a significant change in business and programming practices
- × compared to the current standard, would be relatively inflexible for licensees given the prohibition on any commercial influence.

It follows that this option would be considered to be effective by working to promote community safeguards but might not be efficient or appropriate, in so far as:

- × the costs to licensees might outweigh the benefits to citizens, so that it is not cost effective
- × it is not balanced, as it is directed more at meeting the needs of citizens and imposes more inflexible regulation on industry.

Consultation on these reform options for the Disclosure Standard

The ACMA is keen to receive submissions on the possible options for reforming the Disclosure Standard.

1. What costs would be incurred by:
 - > Varying aspects of the current standard but maintaining the disclosure model?
 - > Revoking the standard in favour of an industry code?
 - > Shifting the current standard to an editorial independence model?
2. What benefits would be gained by:
 - > Varying aspects of the current standard but maintaining the disclosure model?
 - > Revoking the standard in favour of an industry code?
 - > Shifting the current standard to an editorial independence model?
3. To ensure community standards in respect of the fair and accurate coverage of material of public interest, should the ACMA regulate:
 - A. Only current affairs programs?
 - B. Factual programs?
 - C. All public interest material irrespective of program format?

Submitters may be assisted in estimating the compliance costs of possible regulatory reforms by using the Business Cost Calculator, developed by the Department of Finance and Deregulation, available online at:

www.finance.gov.au/obpr/bcc/index.html

3. Compliance programs

3.1 Overview

In this chapter, the ACMA sets out the evidence for industry compliance with the Broadcasting Services (Commercial Radio Compliance Program) Standard 2000, and concludes that a program standard provides a higher level of community safeguard than is presently required to encourage licensee compliance with regulatory obligations.⁷⁵ The elements of the current standard are identified, as is the scope of reform. Finally, two reform possibilities are proposed: vary aspects of the current standard, or revoke the standard with the ACMA dealing with breaches of regulatory obligations on an individual licensee basis.

3.2 Evidence of need and scope

In 2009, the ACMA commissioned a survey of members of the commercial radio industry to consider the effectiveness, efficiency and appropriateness of the Compliance Standard. The survey indicated high rates of compliance with the primary requirements of the standard. The primary requirements are to develop, implement and maintain a compliance program. Of the 250 commercial radio licensees that participated in the survey, almost all (96 per cent) had developed and implemented a compliance program, and almost all of these (95 per cent) had maintained a compliance program.

A small percentage of licensees who reported not meeting the Compliance Standard felt that it was unnecessary or irrelevant to their particular station or network. In many cases, this was largely because they felt they were achieving compliance with their regulatory obligations without having a dedicated program. Other reasons given for non-conformity were a lack of awareness of the particular requirements, being too busy, or a lack of available resources.⁷⁶

The survey also asked licensees to describe the benefits and disadvantages associated with the Compliance Standard. The main benefits described by industry were improvements in staff awareness of obligations (particularly through training) and assistance with fulfilling their broad ranging regulatory obligations.⁷⁷ The major disadvantage described was the time and resources required to meet the terms of the standard.⁷⁸

Possible economic impact on licensees

The possible economic impacts of strengthening, relaxing or revoking the Compliance Standard are difficult to estimate. The key benefits of the Compliance Standard arise from it being a tool for educating licensees about their obligations under the codes, standards and the Act.

However, this standard imposes a prescriptive form of compliance strategy. It may prevent licensees from formulating their own innovative strategies for compliance, which could result in a cost reduction in complying with their obligations.⁷⁹

⁷⁵ Referred to in the remainder of this chapter as 'the Compliance Standard'

⁷⁶ *Industry Compliance with the Compliance Program Standard 2010* at page 48–49.

⁷⁷ *Industry Compliance with the Compliance Program Standard 2010* at page 50–51.

⁷⁸ *Industry Compliance with the Compliance Program Standard 2010* at page 48.

⁷⁹ *Reform of the Commercial Radio Standards: A Review of the Expected Economic Costs 2010*.

3.3 Is there a benefit in maintaining a program standard?

Given the improvement in industry awareness of its regulatory obligations, the ACMA is reconsidering whether regulation by a program standard remains the most appropriate way to encourage licensee compliance with regulatory obligations. The purpose of the Compliance Standard is to ensure licensees are aware of their regulatory obligations— matters dealt with by the regulator but not generally dealt with in industry codes.

Under section 125 of the Act, the ACMA must determine a program standard where it is satisfied that either one of the following is the case:

- > there is convincing evidence that a code of practice registered is not operating to provide appropriate community safeguards for a matter referred to in subsection 123(2) of the Act
- > no code of practice has been registered for a matter referred to in subsection 123(2) of the Act.

In deciding what the most appropriate regulatory mechanism is, the ACMA is guided by its assessment framework for optimal conditions for effective self- and co-regulatory arrangements.⁸⁰ The optimal conditions can be grouped into two main categories:

1. **Environmental conditions** primarily relating to market and industry circumstances and whether these indicate that industry participants have the incentives and ability to work together effectively to address the issue.
2. **Features of the regulatory scheme** relating to its operation and enforcement.

To revoke the Compliance Standard, the ACMA would need to be confident that appropriate community safeguards can be provided through the primary regulatory obligations on commercial radio licensees.

Prior to the introduction of the Compliance Standard, there was no formal system operating across the commercial radio industry ensuring licensees made staff aware of the regulatory framework and their obligations. The *Commercial Radio Inquiry 2000* noted systemic failure of the industry regarding compliance with regulatory obligations.

Meeting the Compliance Standard does not ensure a licensee is meeting all its regulatory obligations. For example, a licensee can repeatedly contravene a licence condition, code, the Advertising Standard or the Disclosure Standard but meet the Compliance Standard because it has in place the primary requirements, such as a compliance policy and training is provided to presenters and staff.⁸¹

As discussed below, the operation of the Compliance Standard appears to have created an industry-wide compliance culture. There appears to be a level of shared understanding about compliance as demonstrated by the research that industry is now more aware of its regulatory obligations. Further, there have been only a small number of breaches of the Compliance Standard in formal investigations by the ACMA.⁸²

⁸⁰ As contained in the ACMA's Occasional Paper *Optimal Conditions for Effective Self- and Co-regulatory Arrangements*, 2010. Available at: www.acma.gov.au/WEB/STANDARD/pc=PC_312187

⁸¹ See *Australian Communications and Media Authority v Radio 2UE Sydney Pty Ltd (No 2)* [2009] FCA 754 at 39.

⁸² See the ACMA investigations into licensee Festival City Broadcasters Pty Ltd (FiveAA) in September 2004, which found one breach of the Compliance Standard, available at: www.acma.gov.au/WEB/STANDARD/pc=PC_310233. Also see the ACMA investigation into licensee Radio

Therefore, the ACMA is of the view that the industry-wide requirement for compliance programs may no longer be necessary. In this respect, if the ACMA were to revoke the Compliance Standard, it would be unnecessary to require provisions about compliance programs in an industry code. Instead, the ACMA would regulate under existing powers in the Act and deal with issues on an individual licensee basis.

Finding 3.3.1 —The Compliance Standard is not the primary mechanism required to encourage licensee compliance with regulatory obligations.

3.4 The current standard

The current Compliance Standard requires licensees to formulate, implement and maintain a compliance program to educate and assist in compliance with their regulatory obligations under the Act, the Advertising Standard, the Disclosure Standard and codes. Under the standard, a licensee's compliance program must include:

- > a written compliance policy
- > staff training
- > monitoring
- > an annual audit.

As noted above, meeting the Compliance Standard does not ensure that a licensee meets all its regulatory obligations.

3.5 Scope of any reform

In considering the need of any reform, the focus is on the following questions:

- > Is there an industry culture of compliance or non-compliance?
- > Is a program standard on compliance programs necessary?

3.5.1 Is there an industry culture of compliance or non-compliance?

The Compliance Standard was introduced to address an industry culture of non-compliance with regulatory obligations contained in codes and licence conditions existing at the time of the *Commercial Radio Inquiry 2000*. The standard therefore sought to create an industry culture of compliance, by requiring all commercial radio licensees to formulate, implement and maintain a compliance program.

CRA submitted that the Compliance Standard is no longer required as the industry is now well informed and has a strong compliance culture.⁸³

The industry survey research indicates that the majority of commercial radio licensees that participated have in place a compliance program—indicating both a very high rate of compliance with the standard and an appreciation of regulatory obligations generally.⁸⁴

This high level of compliance with the standard indicates that the introduction of the standard has:

- ✓ provided stable and predictable regulation for licensees.

2UE Sydney Pty Ltd in August 2006 (Investigation Report No 1790) which found one breach of the Compliance Standard, available at: www.acma.gov.au/WEB/STANDARD/pc=PC_310230.

⁸³CRA submission to the ACMA issues paper at page 22.

⁸⁴ *Industry Compliance with the Compliance Program Standard 2010* at page 48–51.

Further, its operation has been effective and appropriate to the extent it:

- ✓ worked to support industry compliance
- ✓ achieved a balance between the needs of citizens and regulatory burden on licensees.

Finding 3.5.1—The Compliance Standard has led to an improved industry culture of compliance since 2000.

3.5.2 Is a program standard on compliance programs necessary?

Submitters differed in their support for regulation of compliance programs. CRA drew upon the industry survey findings to conclude that:

There is no current evidence of systemic compliance problems within the industry. Inevitably, there will be occasional breaches of the Codes by licensees, as in any industry, but this does not justify the imposition of an industry wide Standard.⁸⁵

As indicated above, the ACMA also finds that industry culture has improved since the Compliance Standard was introduced. While industry members acknowledged the relevance of the Compliance Standard, broadcasters believe it represents considerable administrative burden.⁸⁶

Given the requirements set out in the standard, the ACMA acknowledges some industry concern about administrative burden. However, it was widely accepted at the time of the *Commercial Radio Inquiry 2000* that the extra financial and administrative burden imposed by the Compliance Standard was necessary to ensure that the objects and aims of the Compliance Standard were met. The ACMA acknowledges that the regulatory burden of a program standard may no longer be justified, given the improved culture and the ACMA's ability to deal with individual non-compliance under the Act.

The Hobart Community Legal Service submitted that where a disclosure model is maintained, it is desirable to also maintain a Compliance Standard:

... if the freedom of the Ex-post model is to be retained, there must be a focus on encouraging adherence to standards by creating a culture of compliance within the industry. This is best achieved through the Compliance Program Standard⁸⁷

The ACMA does not agree that where a disclosure standard is in place there is also necessarily a need for a separate standard dealing with overarching compliance or compliance programs. The ACMA can deal with individual licensee breaches of a disclosure standard. In this regard, enforcement options currently available under the Act include remedial actions, enforceable undertakings and additional licence conditions.

While at the introduction of the Compliance Standard the financial and administrative burdens on licensees were considered necessary, the retention of the standard into the future might:

- × impose unnecessary financial and administrative burdens on licensees
- × fail to provide appropriate flexibility for licensees in educating employees on regulatory compliance.

⁸⁵CRA submission to the ACMA issues paper at page 23.

⁸⁶DMG Radio submission to the ACMA issues paper at page 8.

⁸⁷Hobart Community Legal Service submission to the ACMA issues paper at page 3.

It follows that the continuing application of the standard given improved industry awareness is inefficient and inappropriate in so far as:

- × the cost to industry outweighs the benefits to citizens, failing to be cost effective
- × it fails to achieve a balance between the needs of citizens and the regulatory burden on licensees.

Finding 3.5.2—Compliance with regulatory obligations can be addressed by the ACMA through other appropriate enforcement mechanisms for individual licensees.

3.6 Proposed reform options

Industry survey results and responses to the ACMA issues paper demonstrate that industry compliance with regulatory obligations is important. The ACMA considered whether an industry code could be developed to deal with compliance—but as compliance is a matter for the regulator, it would not be suitable for an industry code. For that reason, the ACMA identifies two actions for the future of the Compliance Standard that address the findings in this chapter. They are:

1. vary aspects of the current standard
2. revoke the current standard with the ACMA to deal with breaches on an individual licensee basis.

The first action relies on the finding that the Compliance Standard has led to improved industry compliance and awareness of regulatory obligations. This option would see the program standard continue to encourage the maintenance of a compliance culture across industry.

The second action would see the Compliance Standard revoked, without replacement by any other regulation, noting both findings in this chapter that industry compliance has improved and that the ACMA can deal with breaches of regulatory obligations on an individual licensee basis.

OPTION 1—Vary aspects of the current program standard

The Compliance Standard has operated to educate and increase licensee awareness of its regulatory obligations. Therefore, it may be argued that the standard should be maintained, despite the finding at section 3.3 that a program standard provides a higher level of community safeguard than is necessary.

Noting the increased industry awareness of regulatory obligations, the Compliance Standard could be varied to relieve some of the financial and administrative burdens on licensees. For example, the standard could simply require annual reporting of compliance measures and education undertaken by the licensee. The exact features of this proposed variation would depend on submissions to this paper. However, as the main benefits of the standard have been achieved, the ACMA would envisage lessening the burdens on licensees rather than imposing additional regulation.

In respect of the objects and regulatory policy of the Act, maintaining a program standard (however varied) would:

- ✓ be stable and predictable for licensees and listeners as it is not envisaged that additional regulations would be imposed
- × maintain the financial and administrative burden on licensees to develop and maintain compliance programs—which may be unnecessary given the improved industry culture

- × not provide any flexibility for licensees (depending on the variations made to the standard).

It follows that this option may be effective in supporting industry compliance, but might not be efficient and appropriate, in so far as it would:

- × not be cost effective, as it maintains a cost to industry which outweighs the benefits to citizens
- × fail to achieve a balance, imposing a heavier regulatory burden on commercial radio licensees than is needed.

OPTION 2—Revoke the current standard with the ACMA to deal with breaches on an individual licensee basis

The Compliance Standard has largely fulfilled its mandate by delivering most of the achievable benefits and encouraging a compliance culture across industry. Therefore, the current standard could be revoked, with industry undertaking its own (non-mandated) internal education campaigns about compliance and regulatory obligations. This action would not be the subject of an industry code but the ACMA is likely to seek regular reporting on industry initiatives.

In the event of non-compliance by individual licensees, the ACMA can utilise a range of existing enforcement powers available under the Act.

In respect of the objects and regulatory policy of the Act, revocation of the program standard would:

- ✓ be stable and predictable for licensees and listeners, while the regulatory obligations on licensees are maintained in respect of industry codes, program standards and licence conditions.
- ✓ lessen unnecessary financial and administrative burdens on licensees
- ✓ provide sufficient flexibility to allow licensees to educate employees on the relevant regulatory obligations.

It follows that this option may be effective, efficient and appropriate in so far as it would:

- ✓ reward industry compliance
- ✓ be cost effective as it balances the benefits to citizens and the costs to industry
- ✓ achieve a balance between the needs of citizens and regulatory burden on licensees.

Consultation on these options for the Compliance Standard

The ACMA is keen to receive submissions on the possible options for reforming the Compliance Standard.

1. What costs would be incurred by:
 - > Varying aspects of the current standard?
 - > Revoking the current standard?
2. What benefits would be gained by:
 - > Varying aspects of the current standard?
 - > Revoking the current standard?

Submitters may be assisted in estimating the compliance costs of possible regulatory reforms by using the Business Cost Calculator, developed by the Department of Finance and Deregulation, available online at: www.finance.gov.au/obpr/bcc/index.html